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Supreme Court of the United States.

October Term, 1880.

COMMISSIONERS OF THE DISTRICT OF COLUMBIA, ET. AL.,

vs.

COLUMBUS ALEXANDER.

Equity, No. 98.

An Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR THE DISTRICT.

A. G. RIDDLE,
Attorney for the District of Columbia.

Globe Job Print.

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BRIEF FOR THE DISTRICT.

THE CASE AND DECISIONS BELOW.

Columbus Alexander by his bill alleges that he is the owner of land in square 286, fronting on New York avenue, in the city of Washington. That the late Board of Public Works of the District assessed it for the special improvement of said avenue, made by them, which not being paid the Board, on the 2d day of September, 1872, issued a certificate of indebtedness which was purchased by the bank—the co-plaintiff. The year having elapsed, the Commissioners of the District (Jan. 5, 1875) were about to sell the property at the request of the bank.

In addition to the general objections to the validity of special assessments, the bill specially sets up excessive charges; that the United States had paid enough to cover the private assessment, &c.

PRAYER FOR INJUNCTION.

All the defendants answered. Statements of John C. Harkness and Adolph Cluss were put in as evidence. The case was certified to General Term.

On final hearing the court sustained the bill and enjoined the sale.

Defendants below appealed, and for errors say:

1. The court erred in holding that the Court of Equity had jurisdiction to restrain the enforcement and collection of the tax.
2. The court erred in holding that the remedy for irregularities or errors was not by *certiorari* but by injunction.
3. The court erred in holding that the cost of the improvement had been reimbursed to the District by Congress.
4. The court erred in holding that there was no mode of assessment provided by the act of the legislative assembly of August 10, 1871.
5. The court erred in holding that the collection of the certificate for non-payment of the tax could not be enforced by sale of the property against which it was issued.
6. The court erred in holding that the proceedings of the Board of Public Works under acts of Congress and acts of the legislative assembly were null and void.
7. The court erred in holding that the complainant was under no obligation to pay any part of the tax or certificate as a condition precedent to the institution or maintenance of his suit.
8. The court erred generally both as respects the law and the facts.

POINTS MADE.

First. For excessive charges the law provides for a revision. (Act of June 19, 1878.)

Second. The case is directly within the cases of Mattingly vs. the District of Columbia, and the District of Columbia vs. Shoemaker. (7th Otto.)

The bill should be dismissed.

A. G. RIDDLE,
For the District.

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SUPREME COURT U.S.
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SUPREME COURT OF THE UNITED STATES.

WM. DENNISON, SETH LEDYARD PHELPS, AND J. H. KETCHUM, *Commissioners of the District of Columbia*, AND THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK, APPELLANTS,

vs.

COLUMBUS ALEXANDER, APPELLEE.

Brief of Argument for Appellee.

JOS. J. STEWART,
Solicitor for Appellee.

W. H. MOORE, PRINT. NO. 511 ELEVENTH ST.

SUPREME COURT OF THE UNITED STATES.

WM. DENNISON, SETH LEDYARD PHELPS, AND J. H. KETCHUM, *Commissioners of the District of Columbia*, AND THE FIRST NATIONAL BANK OF THE CITY OF NEW YORK, APPELLANTS,

vs.

COLUMBUS ALEXANDER, APPELLEE.

Statement of the Case.

This suit was originally brought by the appellee, Columbus Alexander, in the Circuit Court for the District of Columbia in Equity, whence, by consent of parties, it was referred for hearing in the first instance to the Supreme Court of the District of Columbia; its object being to test the validity of a Certificate of Indebtedness (so-called) issued by the Board of Public Works of said District, and purporting to be a lien upon certain real estate belonging to the appellee; and to prevent, by injunction, the sale of said real estate by the Commissioners of the District of Columbia. Under an order of reference passed at Special Term on the 15th day of December, 1875, the said cause was presented and submitted in General Term upon the pleadings, and upon proofs to be found in certain official documents agreed to be admitted as testimony.

The appellee is a resident of the District of Columbia and the owner of real estate therein situated, known as part 2 of square 286, fronting on New York avenue, which was advertised by the Commissioners of the District to be sold in payment of a certificate of indebtedness issued by the Board of Public Works, and held by the First National Bank of New York, a copy of which is filed among the proceedings in the case, and claimed by the appellants to be a lien upon said lot for special improvement taxes.

The appellee as complainant below, in his bill for injunction, alleged that said certificate of indebtedness was illegally issued and was not a lien upon his said real estate; that the assessment upon which it was based was not in conformity with the requirements of law, and the mode of collecting the same was in con-

travention of that prescribed by law. He further alleged that the charge per front foot was excessive and fraudulent, being based upon a pretended average of the cost of improvement on New York avenue, from 9th to 15th streets, which was unreliable and greatly in excess of the appropriation under which it was made:

That $4,801.42 was added to said cost without authority of law, being a charge of five per cent. for general expenses. [See Report of the Board of Public Works for 1872, Table XVIII.]

That $6,599.10 of the officially stated cost was for undoing and doing over again work that had been already done, and was therefore chargeable, if at all, to the general fund, and not to the special assessment for which said certificate was issued. [See Report of B. P. W., 1872, Table XXIV.]

That the contract for said work authorized the payment of but 30 cents per square foot, while 40 cents was charged for grading the same, making an excessive charge on that account of $654.15, which should be deducted from the aggregate, and with the other said illegal charges would reduce the same to about $114,000.00.

That the aggregate cost of said improvements had been assessed and collected from the United States Government on said improvements, charged to intersecting streets, to the street railway companies and others than the property-holders, aggregating the sum of $118,000.00 and upwards; and any further collections on account of said improvements would realize largely in excess of their cost, and therefore could not be made.

That over 90 front feet ($91\frac{4}{12}$) of real estate fronting on New York avenue were exempted from assessment in square 257, and $44\frac{6}{12}$ feet in square 372 for church property and property belonging to the District of Columbia, and the cost of improvements in front of said lots was illegally charged and assessed upon the appellee and other private property owners, instead of being charged to the general fund, as it should have been.

That the said appellants, by advertising appellee's property for sale, had done him a great wrong, casting a cloud upon his title, and inflicted irreparable injury, for which he was remediless at law.

He therefore asked the interposition of equity to restrain said Commissioners and their successors in office from selling his said real estate, and from all further proceedings to enforce the payment of said certificate of indebtedness.

The Commissioners of the District of Columbia, in their answer to said bill of complaint, admitted:

That complainant was the owner of lot 2, square 286; that they had advertised it for sale Jan. 5, 1875, on application of the First National Bank of New York, claiming to be the holder of a certain certificate of indebtedness issued by the late Board of Public Works for $170.36, bearing interest from Sept. 2, 1872, which purported to be a lien on said property.

Disclaiming personal knowledge on the subject, they on information and belief denied that complainant was not allowed the time of legal notification of said assessment for thirty days; and said that notice to him was issued the 29th and not served until 31st August, 1872, and certificate bears date Sept. 2, 1872; but did not pass out of the hands of the Board of Public Works until more than thirty days had elapsed after service, after which the holder bought it, and during the intervening period complainant had full opportunity to pay said assessment, but at no time offered or expressed a willingness to do so. On the contrary, he with others began proceedings to prevent the issuing of said certificate.

They admit said lot is on New York avenue, near 12th street, and that assessment was at the rate of $\$10.24\frac{6}{100}$ per *front* foot, exclusive of charges for water and sewer service, making a total of $11.82 per front foot. They have no personal knowledge, but on information deny that said charge is excessive and fraudulent, and have no knowledge of different statements of cost having been made by the Board of Public Works. They are informed and believe that in Aug., 1872, a statement of said expenditure incurred on New York avenue, from 9th to 15th streets, was made in the office of said Board as a basis of assessment, amounting to $132,486.52, to which was added afterwards $11.49, making $132,498.01; that subsequently to the assessment being made the sum of $786.30 was added to the statement of expenditures, but is not charged in it; that from said - $132,498 01 deductions were made as follows:

Appropriated by Congress - -	$14,939 45	
One-half intersections charged to lateral streets - - - - -	19,315 97	
Charged to streets and railroads -	2,214 40	
		36,469 82
Balance - - - - - - -		96,028 19
To which a charge of 5 per cent. adds		4,801 42
Total - - - - - -		100,829 61

of which one-third, or $33,609.87, was collected from property adjoining and especially benefited, together with $1,320.06 and $897.03 for lateral water and sewer service, making in all $35,826.96 collectible from said property.

They admit that said charge of five per cent. was made to cover that portion of the expenditures on said improvements, including general and incidental expenses, superintendence and expenses of like nature; but said amount was charged only after deducting the congressional appropriation, the cost of one-half

intersection of lateral streets, and the charge against street railroads, also $78.50 was deducted and charged to H street, and $21.93 on account of sewer service before said assessment; and they deny every statement of complainant in conflict with this. Disclaiming personal knowledge, they are unable to admit and consequently require proof that deductions should have been made in respect of the alleged overcharge for grading.

They say that First Auditor's account, Aug. 2, 1872, shows Congressional appropriation as $192,050.12 for work in front of U. S. property, of which $19,881.05 is for New York avenue, between 9th and 15th streets, of which $2,271.22 was credited to H street and $2,670.40 to I street; the balance of $14,939.45 to New York avenue. The said Commissioners admit that seven months afterwards, March 4, 1873, a further appropriation was made by the United States, of which there was charged on account of New York avenue $137,572.80, deducting former appropriations.

Whether or not these two appropriations relieved said property of appellee from the lien created by the assessment previously made and certificate previously issued and in the hands of a third party who had purchased the same, is a question of law which they submit for the decision of the Court.

It is also admitted that church property was omitted from the assessment in square 251 and District property in square 372, but said appellants were advised that assessment on this basis was lawfully made. They had no knowledge or information as to illegality in said assessments or in the mode of collecting the same, but were advised that it was their duty under the law to advertise said property as they did upon the request of the holder of said certificate, and they denied that their proceedings had done or would do the appellee harm.

The appellant, The First National Bank of the City of New York, making separate answer, admitted that appellee was a citizen of the District of Columbia and owner of the lot referred to as advertised for sale by the Commissioners, from Dec. 8, 1874, till January 5, 1875, at request of said appellant, holder of a certificate of indebtedness thereon for $170.36, with interest at the rate of 10 per cent. per annum from 2d September, 1872; of which certificate Complainant's Exhibit A was admitted to be a correct copy.

Said appellant averred that the appellee intentionally and deliberately neglected and refused to pay said assessment for more than thirty days after notice, and openly and repeatedly declared that he would not pay the same; that on the 30th September, 1872, appellee, with others, filed bill No. 2924, equity, to restrain the District of Columbia from issuing certificates of indebtedness for said improvements, and the record and decree in said case is

made part of appellant's answer, for all the purposes for which the same can be in any way used or considered. It is averred that the 13th paragraph of the bill in that case distinctly stated that said certificate was then "prepared," and would be issued at the expiration of thirty days from the 31st August without any pretense of its being prematurely issued.

It is denied that said certificate was illegally issued and is invalid, and that it is not a lien within the purpose and meaning of the act of the Legislative Assembly of August 10, 1871.

It is admitted that appellee's lot is on New York avenue, near Twelfth street, and that the assessment against the same is $\$10.24\frac{69}{100}$ per front foot for improvement, exclusive of water and sewer service.

It is denied that said charge is excessive or fraudulent and based on an average of pretended cost, or that different statements of the cost thereof have been made, or that the same are unreliable.

It is admitted that the cost is in excess of specific appropriations, and averred that it was expected to be so under act of Congress of February 21, 1871, to extent of one-third thereof if not more, but it is denied that said cost was in excess of appropriations applicable thereto by legislation of the District.

It is denied that square 251 has a frontage of $263\frac{3}{12}$ feet on N. Y. avenue subject to assessment, while only $172\frac{6}{12}$ front feet have been assessed, and averred that the difference arises from omitting church property from said assessment, which was proper in itself, and cannot be made matter of objection by the complainant to reduce the amount against him, and it is averred that all these matters are trivial and not of sufficient importance, if true, to engage the attention of this court, and to entitle the appellee to the relief he seeks.

It is denied that the omission of $44\frac{6}{12}$ feet from assessment in square 372, belonging to the District of Columbia, was a mistake, and averred that by act of February 21, 1871, and pertinent laws of the Legislative Assembly, said lot was not subject to assessment, and it is denied that it should have been charged thereto.

It is averred that under the organic act and the act of the Legislature of August 10, 1871, the late Board of Public Works had full power to make said improvements and assess the property-owners therefor, and that the improvements were regularly made and assessment of one-third the cost properly ascertained and notice thereof issued, and that defendants became purchasers of the certificate issued against complainant's lot before Congress appropriated anything applicable to New York avenue, and it is averred that Congress neither could nor did by its appropriations impair, affect, or take away defendant's right to said certificate or remedies under it.

It is denied that the system of assessment adopted by the Board of Public Works was not in accordance with the requirements of law; also that the mode of collection is contrary to law, and that the Commissioners of the District in advertising appellee's property for sale had done him an injury, or were about to perpetrate a wrong for which he had no adequate remedy at law.

It was agreed by all parties that the acts of the Legislature of the District of Columbia, the published maps of the lots and subdivisions of the same on New York avenue from 9th to 15th streets, the published Reports of the Board of Public Works for 1872 and 1873, the published answer of the Governor of the District to the committee of Congress, with accompanying tables, and an official copy or copies of the contract or contracts for the improvement of New York avenue, may be used in evidence by either side in the above-entitled cause, without further proof of the same under a commission to take testimony.

The case having been heard, the prayer of the bill was allowed and the appellants were perpetually enjoined from further proceedings under said Certificate of Indebtedness.

Mr. Justice MacArthur, delivered the opinion of the Court as follows, to wit:

Opinion of the Court.

Two terms have elapsed since this cause was argued and submitted; and owing to the importance of the questions involved, and the diversity of views entertained, we have been unable to announce a decision until the present time. Even now I can only give a very brief statement of my views, and although a majority of the Court concur in the conclusion, it is upon grounds not altogether shared in by those of us who agree in the final disposition to be made of the cause.

The bill is filed to restrain the Commissioners of the District from selling the real estate of the complainant in payment of a certificate of indebtedness issued by the late Board of Public Works, which is claimed to be a lien upon the property of the complainant for special improvement taxes. The complainant alleges that the certificate was issued without authority of law, and constitutes no lien upon his real estate. He states various irregularities in estimating the cost of the improvement, in making the assessment, and in advertising the sale. He charges that large sums were computed which did not constitute any part of the cost, and that property liable to taxation was not included in the assessment for the reason that it belonged to religious institutions, and some of it to the District of Columbia; and he fur-

ther alleges that the entire cost of the improvement has been assessed to and collected from the United States Government. I will, however, confine my observations entirely to the legality of the certificate in connection with the alleged payment of the work by the General Government.

In the case of Harkness vs. The District, 1 MacA., 121, we decided that as a court of equity we would not interfere by injunction to restrain the collection of a tax upon the mere allegation that the tax is illegal or void, and the Supreme Court has so often decided the same way, that the principle may now be considered settled law. This rule, however, has its exceptions; and whenever the enforcement of the tax would lead to multiplicity of suits, or irrepairable injury, or throw a cloud upon the title to real estate, equity will interpose its preventive remedies. It is not my intention to infringe upon this principle in the present case, but to adjudicate within its limitations. We have not yet passed upon the validity of these certificates, although they have been argued before us many times. In the case just referred to, we expressly declined to do so where an application was made for a preliminary injunction to prevent the certificates from being issued. The Government was then proceeding to enforce the collection of its revenue. But these taxes have now been anticipated by the sale of the certificates, and the District cannot now be embarrassed in the speedy collection of its taxes. The question of public policy no longer exists, and if it be true that the costs of the improvement have also been collected from the Government of the United States, the sale of the property cannot take place without casting a cloud upon the title for which the complainant would have no remedy at law. Under these circumstances I think the rule which prevents a court of equity from restraining the collection of an erroneous tax is not applicable. The special circumstances exist which would authorize us to interpose for the purpose of preventing a cloud upon the plaintiff's title.

The only authority for issuing the special improvement certificate, is found in the act of the legislative assembly, approved August 10, 1871, sess. 1, 31. The third section provides that thirty days after the assessment, if the tax is not paid the Board of Public Works shall issue certificates of indebtedness against the property assessed, which shall bear interest, and shall remain a lien upon the property; and if the assessment shall not be paid within one year, the Board shall proceed to sell the property on the application of the holder of the certificate. But it is contended that the Legislative Assembly had no authority to authorise the Board of Public Works to issue such certificates, or to declare them a lien upon real estate, and that, therefore, the act is null and void in this respect. To determine this question, a

reference to the 37th section of this act of Congress, approved February 21, 1871, organizing a government for this District, becomes necessary. That section provides that the Board shall have power "to disburse upon their warrant all moneys appropriated by the United States, or the District of Columbia, or collected from property holders, in *pursuance of law*, for the improvement of streets, avenues, alleys and sewers, and roads and bridges, and shall assess in such manner as shall be *prescribed by law*, upon the property adjoining and to be especially *benefited* by the improvements authorized by law and to be made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected *as all other taxes are collected.*"

It is here distinctly declared that the Board shall assess in such manner as shall be *prescribed by law* upon property benefited by improvements an amount not to exceed one-third of the cost, and here their express powers end. They have nothing but the function of assessment, unless it is to disburse upon their warrant all money appropriated by the United States or the District, or collected from the property holders in pursuance of law for the improvements. It may well be doubted whether a valid assessment was ever made. The Legislative Assembly undertook to "*prescribe by law*" in the act of August 10, a mode of assessing for special improvements, and they enact that a statement of the cost thereof shall be prepared by the Board of Public Works, and that an assessment based upon said statement shall be made as provided for in the 37th section of the organic act. But no mode is provided for making the assessment itself. Whether it shall be according to the front foot or upon the superfices of the lots, or according to their different values, are matters left entirely to the discretion of the Board, instead of being "prescribed by law." The usual grounds and formalities of assessment and collection are not prescribed in accordance with the provisions of any law. Even if the Legislative Assembly had the power of delegating the mode of assessing to the Board under its general power of legislation, it could not do so in regard to the special taxes, because the organic act requires explicitly that the mode of assessment shall be prescribed by settled law. It cannot well be contended that the members of the Board of Public Works could assess according to their own will and pleasure, for the organic act was undoubtedly framed in this respect to prevent the abuse which might result from such arbitrary methods of imposing burdens upon the property of citizens.

We have seen that the 37th section of the act for the District government requires that a reasonable proportion of the cost of improvement, not exceeding one-third of the cost of the improvement, is to be assessed on the adjoining property, "which sum

shall be collected as all other taxes are collected." How then are other taxes collected, by whom and under what accountability, and who is responsible for their safe keeping? Certainly not the Board of Public Works. We know who is the accountable officer in the collection of all other taxes and the process by which he performs his duty, and that issuing certificates and selling them in the market in anticipation of the taxes constitute no steps in the process of collection. By the section of the charter already referred to the special assessments are to be collected in the same way, and all laws in existence within the District prescribing the duties of officers entrusted with this important duty cover and protect the costs of improvements. But the Assembly in disregard of all this have prescribed an entirely different manner of collecting them, and have declared that if they are not paid within thirty days, the said Board of Public Works shall immediately afterwards issue these certificates, bearing interest, which are to remain a lien upon the property, and for which it may be sold at the end of a year by the Board upon the application of the holder. Now there is no law prescribing that "all other taxes are collected" in this manner. There is no law which authorises in regard to all other taxes a certificate as a step in the process of collection, and which is to bind the property and become transferable. The act of the Assembly provides a special and summary manner of enforcing the payment of these taxes wholly unknown to the law of the District, and therefore in direct violation of the act of Congress. To that extent it is therefore null and void, as are all the proceedings under it. But it is said that Congress has recognized the validity of this act of the Assembly; and we are referred to the act of Congress abolishing the District government; the 2d section of which provides that nothing therein contained shall affect any provisions of law authorising or requiring a deposit of certificates of assessment with the sinking fund Commissioners of the District. This is not to be considered as a ratification judicially or by Congress of the Assembly, in regard to these certificates. The same act provides that *all taxes lawfully assessed* shall be collected, and the power of anticipating the taxes by a sale of the evidence thereof is expressly prohibited. It cannot, I think, be successfully maintained, that an act of Congress which prohibits these certificates, and declares that only taxes which have been lawfully assessed can be collected is a ratification of the Assembly legislation, so as to take away the right of the tax payer, to defend his property from sale upon a lien which had been previously void. The other alleged ratifications by acts of Congress are mere implications, and are liable to the same disposal.

Upon the grounds thus briefly stated I come to the conclusion that the certificate sought to be enforced against the property of

complainant is without authority of law; and yet if the District authorities were seeking the immediate collection of the taxes, as a means of carrying on the government, we would, I think, be compelled to refuse the remedy sought in this case.

In the case of Harkness v. The District, already referred to, the Court say: "In the leading cases where the attempt has been made to enjoin taxing officers, the courts have declared that there are reasons of public justice and policy why a court of chancery should not interfere to suspend the collection of public revenue unless in exceptional cases. Where declarations have nearly all been made in cases of special assessments, and are founded upon the necessity of a speedy collection of the taxes as the means of carrying on government—these considerations have deterred courts of equity from subjecting the collection of public revenue to the hazard and delay of protracted chancery litigation." This grave question of public policy does not however apply to the case at bar, for the certificate in controversy has been sold to and is now the property of the First National Bank of New York, and the sale sought to be restrained is for the benefit and at the instance of that institution. The Government has received all it ever will in exchange for that evidence of the tax, and not one dollar to be realized from the sale of this property, could be used as the means of public revenue. It is a mere contest between individuals in which the public have no direct interest. The bank perhaps, on a collateral proceeding at law, has a claim against the District, but upon that we are not at present called upon to pronounce an opinion and do not. I am of opinion that the jurisdiction of this court, under these circumstances, will interfere as in other cases of litigation involving only the rights and interests of private persons. The bank undoubtedly purchased the certificate as a profitable investment, and subject to such disadvantage as tax titles usually inherit, and seeking to enforce a void instrument, it should not be permitted to cast a cloud upon the title to the property of the complainant.

It is also said that complainant should at least pay what is due in order to obtain relief from the whole tax. In tax cases the the Supreme Court has quite recently, in Taylor vs. Secor *et al.*, 2 Otto, 575, laid down this doctrine as founded in the first principles of equity jurisdiction. But in the case before us, it is alleged that the whole costs of the improvements on New York avenue have been collected from the United States. The Commissioners in their answer say:

"That First Auditor's account, August 2, 1872, shows Congressional appropriation as $192,881.12 for work in front of United States property, of which $19,881.05 is for New York avenue, between Ninth and Fifteenth streets, of which $2,271.22 was credited to H street and $2,670.40 to I street; the balance of $14,939.45 to New York avenue.

"Seven months afterwards, March 4, 1873, a further appropriation was made by

the United States, of which there was charged on account of New York avenue $137,572.80, deducting former appropriations.

"Whether or not these two appropriations relieved said property of complainant from the lien credited by the assessment previously made and certificate previously issued and in the hands of a third party who had purchased the same, is a question of law which we submit for the decision of the court."

Now, here it is admitted that an appropriation considerably exceeding the whole expenditure for the improvements on New York avenue has been paid to the District. This would undoubtedly enure to the benefit of persons owning the adjoining lots. The payment of a tax to the proper officers extinguishes the indebtedness, and relieves the property upon which it is assessed; and it is the duty of the Government to make the proper application, so as to redeem any evidence they have given of the indebtedness. The First National Bank should, therefore, present their certificate to the District. So far as the lot is concerned, the lien no longer exists.

To allow the land to be sold for a tax that has been collected, or where the public policy of allowing the Government to collect its revenue, is not involved upon a void tax, would be to cast a cloud upon the title to real estate; and this is the very case in which all the authorities agree that the chancery jurisdiction may be invoked.

I regret extremely that my other engagements have not left me sufficient opportunity to fortify these views with a reference to appropriate cases.

The prayer of the bill must be allowed, and the injunction be made permanent.

WYLIE, J., while concurring in the judgment, was of opinion that a court of equity ought to restrain the collection of an illegal tax where the law had been disregarded or where there was no law for the assessment.

CARTTER, Ch. J., dissented, and HUMPHREYS, J., read an opinion to the effect that the bill ought not to be maintained, as it averred no tender of any portion of the assessment.

The appellants, in their petition to this Honorable Court for allowance of appeal, after statement of certain facts in the case, set forth the following errors as the grounds of their appeal, viz:

1. The Court erred in holding that the Court of Equity had jurisdiction to restrain the enforcement and collection of the tax.

2. The Court erred in holding that the remedy for irregularities or errors was not by *certiorari*, but by injunction.

3. The Court erred in holding that the cost of the improvement had been reimbursed to the District by Congress.

4. The Court erred in holding that there was no mode of assessment provided by the act of the Legislative Assembly of August 10, 1871.

5. The Court erred in holding that the collection of the certificate for non-payment of the tax could not be enforced by sale of the property against which it was issued.

6. The Court erred in holding that the proceedings of the Board of Public Works under acts of Congress and acts of the Legislative Assembly were null and void.

7. The Court erred in holding that the complainant was under no obligation to pay any part of the tax or certificate as a condition precedent to the institution or maintainance of his suit.

8. The Court erred generally both as respects the law and the facts.

The statement of alleged errors by the Supreme Court of the District of Columbia, every one of which is controverted by the appellee, sets forth the points to be discussed before the appellate tribunal.

Brief of Argument.

1. As to Equity Jurisdiction: It is alleged that "the Court erred in holding that the Court of Equity had jurisdiction to restrain the enforcement and collection of the tax;" and it has been argued in the Court below that neither—

1st. The want of authority in the corporation, under its charter, to make taxes a lien upon real estate, or to sell real estate for taxes; nor,

2d. Failure to prescribe a mode of assessment by law, as required by the charter; nor,

3d. The adoption of a different mode of collection from that prescribed by the charter; nor,

4th. Overcharges and other irregularities in the execution of an unconstitutional enactment; nor,

5th. Exemptions of specially improved property from assessment, the cost of which is illegally charged to appellant; nor,

6th. The payment of the whole cost of improvement by the United States Government since the levy was made, are sufficient ground for the interposition of equity, if true. For all these, it is alleged, we have a remedy at law; as also for the cloud cast upon our title and the irreparable injury done us by rendering our property unsaleable.

That remedy at law would seem to be found only in a defence of the appellee's title to possession of his real estate after a deed for the same shall have been given to a purchaser by the Commissioners of the District, and that purchaser shall have attempted to gain possession of the property by a suit in ejectment.

This is a remedy which requires the appellee to stake the entire value of his property upon the soundness of his opinion of the law. Should the Court fail to sustain his views, his property, having been already sold and a deed given therefor, would be

irrecoverably lost. Judges of the highest tribunal in the land may differ in their interpretation of the law, but the citizen is hereby required to know the law so absolutely that loss of property is the penalty for error of judgment. He attempts to protect his rights of property at his peril. But this is no remedy. The party injured cannot bring the suit. That depends upon the volition of another, who may choose not to bring suit for ejectment during the lifetime of the present possessor. That which depends upon the will of another is no remedy at all.

168. "The remedy at law must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity to take away the plaintiff's right to the latter in United States courts." Bunce vs. Gallagher, 5 Blatchford, 481, &c., U. S. Digest, 1st series, Vol. V, p. 183. It is not enough to bar proceedings in equity that a party may by great circuity of action and at great inconvenience at last come to a remedy at law. [Carlton v. Felder, 6 Rich, (S. C.,) Eq. 58, (idem.)

58. To oust a Court of Equity of its jurisdiction on the ground of remedy at law, that remedy must be obvious, adequate and complete. City of Hartford vs. Chipman, 21 Conn., 488; Hollingshead vs. McKenzie, 83, 457; Scott vs. Scott, 33 Ga., 102; Harper vs. Whitehead 33 Ga., 138; Mad. Av. Bap. Ch. vs. Mad. Av. Bap. Ch., 26 How., (N. Y.,) p. 72; U. S. Digest, Vol. V, p. 269.

129. The true test of jurisdiction is whether a demurrer will lie to the bill. The allegations being sufficient to give jurisdiction, no demurrer to a petition for that cause can be sustained. If this be so, neither the summary action of the Court after filing the petition, nor defective proof can affect the question of jurisdiction. Bolgiano vs. Cooke, 19 Md., 375.

150. Where a party's remedy at law is less effectual than in equity, and a Court of Equity has taken jurisdiction of his cause, it will retain it. Page vs. Solomon, 36 Georgia, 541.

Equity jurisdiction attaches where the officers of municipal corporations are acting *ultra vires*, or assuming a power on the property of the citizens which the law does not confer. Judge Dillon, in his able work on MUNICIPAL CORPORATIONS, 2d ed., Vol. 2, page 835, says:

§ 736. Upon a survey of the decisions in Great Britain and the United States, while they discover some diversity of opinion, it seems to us in view of the nature of municipal powers, the danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs, to wit, the taxable inhabitants, that the following conclusions rest upon reason:

1. The proper parties may resort to equity, and equity will entertain jurisdiction of their suit against municipal corporations

Foster vs. Kenosha, 12 Wis., 616; Toledo vs. Lafayette, 22 Ind., 262. Relief will be granted where tax is unconstitutional; Foster vs. Kenosha.]

Hilliard on Injunctions, 3d edition, page 504, &c., says:

"Injunction may be allowed to stay sale or collection of special tax levied without authority of law." (Culbertson vs. Cincinnati, 16 Ohio, 574; Vanover vs. Davis, 27 Geo., 354.)

In Burnet vs. Cincinnati, (3 Ohio, 88,) the Court said that unless equity might thus interpose, "public officers having authority to operate upon the property of their fellow-citizens must be permitted to proceed, however illegal, unjust or oppressive their conduct may be. It follows, too, that the property of a citizen may be exposed to sale under circumstances that render it impossible for the parties to know whether a title can pass or not. Chancery may interpose by injunction to prevent what is considered destruction; but destruction in the sense used does not mean annihilation; it means no more than that injury which greatly impairs its intrinsic value. In a city the sale of part of a lot for assessments, may often be very destructive, i. e., *though no title passed, a cloud would be cast upon the title, which litigation only could remove.* Consequences in respect to the collection of revenue furnish no reason why the Court should not interpose."

§ 13, page 516, Hilliard says: It is the prevailing rule that injunction will not be granted to restrain the levy of an illegal tax, unless it would work an *irreparable injury*, or would *create a cloud upon the title.* Scribner vs. Allen, 12 Minn., 148.

§ 14. Where taxing officers make in their assessment a fraudulent discrimination, to compel the owner of a school land certificate to pay more than his just share, its *collection will be restrained.* Lefferts vs. Calumet, 21 Wis., 688.

Dillon on Municipal Corporations, vol. II, page 829, § 731, "The right to resort to equity to restrain them from levying and collecting illegal taxes and assessments upon real property, is the prevailing doctrine in this country.

Le Grand, Chief Justice, in Holland vs. Baltimore, 11 Md., 186, 1857, says:

"We entertain no doubt upon this question, (the right of owner to enjoin sale of property to enforce void tax.) The idea that a party ought to stand by and see his property illegally exposed to public sale, and then force the purchaser to bring ejectment to gain possession or try his title, seems sustained by no good authority. Such a doctrine would not only encourage circuity of action and multiplicity of suits, but render the title of the real owner comparatively valueless, while the suits at law should be pending. *Equity will not allow a title otherwise clear to be clouded by a claim which cannot be enforced in law or equity.*"

Dow vs. Chicago, 11 Wallace, 108. This case has been much relion on, but it affected personal property only. The bill was filed by a resident of New York to enjoin Chicago from collecting a tax laid by said city on his shares of stock in a bank in Chicago. The bank filed a cross-bill upon the single ground of preventing multiplicity of suits which the Supreme Court held might have been sustained if it had stood alone, but it must fail with the original bill; and that the latter could not stand, either upon this ground or that of *preventing irreparable injury or a cloud upon the title to real property—these three being the only valid grounds for the remedy in equity.* (Page 469, 470, Hilliard on Taxation, § 75.)

This decision is directly in our favor, as we allege irreparable injury and a cloud upon our title to real estate.

"The general consideration was strongly enforced, that taxes being an instrument of carrying on the Government, require to be collected expeditiously"—which consideration does not apply to assessments for special improvements of streets—and therefore cannot be strained to authorize unlawful sales of real estate by public authorities.

Cloud upon the Title.

96 §. "The removal of a *cloud upon the title*, more particularly the title to real property, furnishes *peculiar ground for the interference of equity by injunction.*" (Morris vs. Jersey, 1 Beasl., 227; Mitchell vs. Milwaukee, 18 Wis., 82. See Hilliard on the Law of Taxation.)

In the Court below the case of Hamerwinkle vs. Georgetown, (15 Wallace,) was relied on to establish the doctrine that evidence to establish the cloud in the title must be *dehors* the record, quoting therefrom as follows, to wit:

"It has long been held, also, that there exists no *cloud* upon the title which justifies the interference of a Court of Equity, where the proceedings are void upon their face; that is, the same record which must be introduced to establish the title claim will show that there is no title."

The question would here naturally arise, What constitutes the record? In the case before us, the acts of the Board of Public Works as set forth in their published reports are not essentially parts of the record. Neither is the payment of the whole amount by the United States Government. These are matters extrinsic of the record, although they appear in official reports. But the act of Assembly, or Municipal Council, even when part of the record, may be of such a character as to take it outside of the operation of that rule. It may be so constructed as to cast a

cloud upon the title by its wording and thereby make injunction a necessary remedy. Such was certainly the case in the present instance, as see section 3 of the act of the Legislative Assembly of August 10, 1871:

"SEC. 3. *And be it further enacted*, That if any person or persons, notified as aforesaid, shall neglect or refuse to pay the amount assessed against his or their property, as aforesaid, after the expiration of thirty days, said Board of Public Works shall immediately thereafter issue certificates of indebtedness against the property assessed as aforesaid, which certificate shall bear interest, until paid, at the rate of ten per centum per annum; and until paid the assessment and certificate shall remain and be a lien upon the property on or against which they shall have been issued; and if the said assessment shall not be paid within one year, the said board shall, upon the application of *the holder* of the certificate of indebtedness, proceed to sell the property against which the assessment and the certificate exist, or so much thereof as may be necessary to pay said assessment, such sales to be first duly advertised daily for three successive weeks in the regular issue of some newspaper published in the District of Columbia, and to be made by said board at public auction to the highest bidder; *and a deed shall be given by the Governor, countersigned by the Secretary of the District of Columbia, which deed shall be deemed and held to be a good and perfect title to any property bought at any sale hereby authorized: Provided, That the owner of such real estate shall have the right to redeem the property so sold by paying the amount of the purchase-money, and twenty per centum thereon, within two years from the date of sale.*"

Here not only are the certificate and assessment declared to be a lien upon the property assessed, but the deed to be afterwards given by the Governor "shall be deemed and held to be a good and perfect title to any property bought at any sale hereby authorized."

In U. S. Digest, Eq. II, page 280, see—

279. Where, by the charter of a city, a certain tax was declared to be a lien upon the premises upon which the same was assessed.—Held, that such a lien constituted a cloud upon the title of the person assessed. [Scofield vs. Lansing, 17 Mich., 437.]

307. An action to remove a cloud upon title has been held maintainable. Where there has been a sale and a deed in pursuance of a *void levy*, and the party claims title under them. Stout vs. Cook, 37 Illinois, 283.

Where a title otherwise clear is clouded by a claim which cannot be enforced either at law or in equity. Holland vs. Mayor &c., of Balto., 11 Md., 186.

"Where the statute makes a certificate of sale of land for taxes *prima facie* evidence of the validity of the assessment, and such certificate is in the possession of an adverse claimant, although the records of the proceedings relative to the assessment shows its invalidity upon its face." Allen vs. Buffalo, 39 N. Y., 386.

270. It is an established principle of equity that where an instrument is outstanding against a party which is void, or an unfounded claim is set up, which he has reason to fear may at some time be used injuriously to his rights, thereby throwing a cloud over his title, equity will interfere and grant the appropriate relief. Hartford vs. Chipman, 21 Conn., 488.

Judge Cooley, the learned author of a work upon taxation, in the case of Thomas et al. vs. Cain, Supreme Court of Michigan, October term, 1876, reported in "Law and Equity Reporter," New York, March 28, 1877, held that—

1. Assessments for services levied according to the superficial area of lots, without regard to actual or probable benefits, are unlawful, and the rule prescribed by the Legislature for levying such assessments must at least be one which it is legally possible may be just and equal as between the parties assessed.

2. A statute authorizing an assessment according to superficial area upon such lots as the common council shall determine are increased in market value by the improvement, whether contiguous or not, whether directly benefited or not, or whether city lots or out lots, is held unconstitutional and void.

3. Parties whose property is to be taken by summary tax proceedings are entitled as of right to be heard at some stage of the proceedings before the tax becomes an established charge against them or their property.

4. A bill to enjoin the collection of a tax which by statute is made a lien upon lands, is sustained as a proper one to remove a cloud upon the title to lands.

The decision of the Court touches several points at issue in this case, such as the proper method of levying assessments, the discretionary power of the Common Council as an assessing board, and the proper remedy of the party whose property is to be taken under summary tax proceedings; and is so well fortified with authoritative references by a Judge who is himself an authority upon the Law of Taxation, that we quote as follows:

Judge Cooley says—

"This is a bill to restrain the collection of a sewer tax in the city of Port Huron. The principal question is whether it is competent to provide by law that sewer taxes in a city shall be assessed upon the lots and lands benefited in proportion to their superficial area, irrespective of proportionate benefits.

"Held, that the proper method of levying assessments for sew-

ers has not been much discussed by the courts, but in England they have generally been laid in proportion to benefits received, estimated according to yearly value of the lands within the district, (Rooke's case, 5 Rep., 6 Machas vs. Scroggs; 3 M. and S., 447; Netherston vs. Ward, 3 B. and old, 21; Stafford vs. Hamston, 2 B. and B., 691; Loady vs. Wilson, 3 Ad. and El., 247; 7 El. and Bl., 946;) and in this country assessments for sewers, and also for drains, have generally been levied upon an estimate of special benefits. Reeves vs. Treasurer of Wood County, 80 U. S., 333; Sessions vs. Grunklinton, 20 O., (U. S.,) 349; Draining Company case, 77 Louisiana avenue, 338; O'Reilly vs. Kankakee Draining Company, 32 Ind., 169; Wright vs. Boston, 9 Cush., 233; Springfield vs. Gay, 12 Allen, 612; Brewer vs. Springfield, 97 Mass., 152; Cone v. Hartford, 28 Conn., 363; Cone v Wood. 44 Penn. st., 113; the assessment of sewer taxes by the superficial area is quite unusual; that if the assessment be a tax in the ordinary sense it must, under our Constitution, be assessed by value, but if not it must be apportioned on some other basis, but it does not follow that it may be apportioned on any basis whatsoever which the Legislature may see fit to prescribe; that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses, and that the rule prescribed must, at least, be one that is legally possible, may be just and equal as between the parties assessed. See, also, Clapp vs. Hartford, 35 Conn., 66; Lapps vs. Philadelphia, 38 Penn st,, 503; Philadelphia vs. Tryon, 35 Penn st., 401; Daily vs. Swope, 47 Miss, 367; Alcorn vs. Hamer, 38 Miss., 652; Williams vs. Cammack, 27 Miss., 209; Smith vs. Aberdeen, 25 Miss., 458; McGehee vs. Matthias, 21 Ark., 10; Wallace vs. Shelton, 14 La. ave., 498; Egyptian Levee Company vs. Harden, 27 Me., 497; St. Louis vs. Creamer, 36 Mo., 456; Williams vs. Detroit, 2 Mich., 560; Metz vs. Detroit, 18 Mich., 195; Hoyt vs. E. Saginaw, 19 Mich., 39; Warren vs. Grand Haven, 30 Mich.. 24; Hammersmith Bridge Company vs. Overseers, L. K. 76, 2 B, 230; Lode Water Company vs. Washington ave., 69 Penn st.; Patterson vs. Society, etc., 24 N. J., 400. The only discretion which the act in question here allows to the Common Council as an assessing board is its determining what lots and lands are benefited by the improvement, and when that determination is made the rule of apportionment is fixed, and it must be made according to the area. It is not required that the lands shall be contiguous to each other, or that the benefit to be taken into the account shall be only the direct benefits to the land; and there is nothing in the act to preclude the taxation of lots remote from the sewer if their market value, actual or speculative, is increased by means of it. Held, first, that while this increase of value might be a reason for

general taxation for sewer purposes, it would not warrant an apportionment by superficial area, since that under no circumstances could be just unless limited to lands directly and peculiarly benefited; that, moreover, this act makes no provision by which parties assured may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the expenditure, and makes no distinction between property actually occupied, or capable of being occupied, for city purposes, and that of an agricultural nature, upon which such a burden would fall with great severity and injustice; nor does it confine the assessment to lands upon the street in which the sewer is laid, so that a lot is liable to be assessed several times in different districts for different sewers provided that in the opinion of the Common Council it is benefited by each of them; and while this might not be unjust if each assessment was laid upon an estimate of actual benefits, it is manifest that it would be when levied by an arbitrary standard requiring the burden to be laid upon land far from the sewer, and only slightly benefited, equally with those fronting upon it and greatly benefited; it is not, therefore legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits, and that the assessment in question cannot be sustained. Held, second, that parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property. Philadelphia v. Miller, 49 Penn. st., 440; Butler v. Supervisors, &c., 26 Mich., 22; Dow v. Gray, 2 T. R., 358.

"The bill in this case complains that the city marshal is about to proceed in the collection of the assessment from the personal property of the complainants, and an objection is raised to the jurisdiction."

Here it will be seen that equity interposes by injunction to restrain the collection of an illegal tax from *personal property*, on the equitable ground that a party whose property is to be taken under summary tax proceedings, *is entitled as of right* to be heard at some stage in the proceedings before the tax shall become an established charge against him or his property.

And surely the time has come in the history of this country when such a breakwater should be firmly established in equity against the ever-increasing current of municipal corruption and oppression. This is the age of Ring rule—an age in which gigangic criminals in high places dispose of the property of the citizens as if it were their own; when combinations of pot-house politicians and contractors, with profitable jobs in view, seize upon municipal governments for purposes of plunder. In the eager pursuit of gain at the expense of the public, they are restrained neither by conscientious scruples nor charter limitations.

A Board of Public Works in New York city, with its comprehensive system of public improvements, rides roughshod over private rights and piles up a municipal debt that might appal a nation. A Board of Public Works in the District of Columbia follows its pernicious example; and disregarding alike the charter limitations as to appropriations and the municipal indebtedness, rushes recklessly or until Congress is compelled to supercede the government of the capital of the great republic of the United States, by one that lacks every feature of republicanism; and to issue fifty years' bonds for the payment of a crushing debt, representing so-called improvements, many of which have already been replaced, while more remain in a state of wretched decay.

On behalf of the Commissioners of the District of Columbia it was urged in the Court below that—

"The Legislative Assembly had power to make taxes a lien on land; and the act of February 21, 1871, evidently designed that this power should be exercised. Section 37 provides for an assessment upon property benefited by improvements. It is a charge *in rem* that is provided for. Repeatedly in the organic act the power of the Assembly to levy tax on property is recognized. Section 40 of that act left in force all the laws and ordinances of the city of Washington and Georgetown not inconsistent with said act of Congress until modified or repealed by Congress or the Legislative Assembly of said District- This left in force (but subject to future modification by either Congress or the Assembly) section 7 act of May 17, 1848, 9 St. Lar., 227, whereby it is provided that real property may be sold at public sale to satisfy taxes." [Brief of E. L. Stanton, Esq.]

That the power in a municipal charter to levy and collect a tax, whether general or special, does *not* carry with it the authority to collect by distress or sale of property, or in any way more summary than by a resort to legal proceedings, is well established. [See Dillon on Mun. Cor., § 656.] It is here confessed that no power to create a lien or sell real estate for taxes is given in the organic act; and the attempt is made to derive such power from the old charter of the city of Washington. The act of Congress of 17 May, 1848, was simply an act amendatory of the charter of the city of Washington, extending the authority of the corporation to sell real estate for taxes. This was repealed by the new charter of the District of Columbia in 1871.

The old charter as amended by the act of Congress of 17th May, 1848, entitled "An act to continue, alter and amend the charter of the city of Washington," section 7, enacts that so much of the 10th section of the act of May 15, 1820, *incorporating* the inhabitants of the city of Washington as is in the following

words, viz: "That real property, whether improved or unimproved, in the city of Washington, on which two or more years taxes shall have remained due and unpaid, or on which any special tax, imposed by virtue of authority of the provisions of this act, shall have remained unpaid for two or more years after the same shall have become due, or so much thereof, not less than a lot, (when the property on which the tax has accrued is not less than that quantity) as may be necessary to pay any such taxes, with all legal costs and charges arising thereon, may be sold at public sale to satisfy the corporation therefor," be, and the same is hereby, amended so as to read as follows, viz: "The real property, whether improved or unimproved, in the city of Washington, on which one or more year's taxes shall have become due and remain unpaid, or on which any *special tax imposed by virtue of authority of the provisions of this act* shall have become due and remain unpaid, or so much thereof not less than a lot, (when the property on which the tax has accrued is not less than that quantity,) as may be necessary *to pay any such taxes*, with all interest, costs and charges arising thereon, may be sold at public sale to *satisfy the corporation therefor*." See Corporation Laws, Sheehan, 1853.

This undoubtedly gave to the old corporation of Washington power to sell real estate for taxes, and also for "*special taxes imposed by virtue of the* provisions of the" act of May 17, 1848, but limited the power to sell only to pay "*any such taxes.*" But this was all, and so much as it was, it was expressly repealed by the 40th section of the Organic Act, approved Feb. 21, '71, which says: "And be it further enacted, That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. 1871, and all offices of said corporations established at that date, with a proviso to continue the same for the following purposes, to wit: for the collection of all sums of money due to said cities respectively or to the Levy Court; for the enforcement of all contracts made by said cities respectively or by said Levy Court, and all *taxes heretofore assessed, remaining unpaid*," etc. See Laws D. of C., 1871–72.

There was no reference in the Certificate of Indebtedness under which the sale was to be made in this case, to the old charter of Washington City as a source of authority for the lien it pretended to establish or the right of sale. It was entirely the creature of the act of the Legislative Assembly of August 10, 1871, which was *never ratified* by Act of Congress, although outside of the powers conferred by the charter of Feb. 21st, 1871.

It can hardly be contended that the City Council of the new corporation, although dignified by the title of Legislative Assembly, had authority to amend, or alter an Act of Congress; and yet it is here assumed that this old charter power of the old cor-

poration, continued in an entirely new body politic, of novel construction, with pompous official nomenclature, and operating over a much larger territory, including both of the old corporations and the county of Washington.

If the power to sell real estate for taxes were derived from the old charter, then the provisions of the old charter had to be followed in making the sale. No power could alter these except that of Congress which made them. But the mode of sale prescribed by the act of Assembly conforms, in no respect with that prescribed by the act of Congress of May 17, 1848. Neither does it conform with the mode prescribed for the collection of other taxes by act of Assembly of August 23d, 1871, notwithstanding the organic act requires that these special assessments "*shall be collected as all other taxes are collected.*"

How is this complied with? Act of Legislature Aug. 23, 1871, makes it the duty of the collector of taxes "to collect all taxes imposed by the Government of the District of Columbia *except such as may be otherwise provided for*, and to deposit same with Treasurer, &c. By section 2, he is to give ninety days' notice before proceeding to enfore collection. By sec. 3, he has sixty days thereafter to prepare a list of property in arrears to be published twice a week for four successive weeks, giving notice of taxes due and warning delinquents if same are not paid prior to a day named the property will be sold by said collectors at public auction to the highest bidder," &c.

See Chap. CVIII, (108,) 1871, Acts of Legislature, page 142.

How different is this from the manner of collecting the assessments for special improvements? There we have a thirty days' notice after ten days' assessment—certificates of indebtedness against the property bearing 10 per cent. interest, to remain and be a lien on the property—advertisement of intended sale thereof daily for three weeks, sale to be made by the Board of Public Works and not by the collector of taxes.

Authority for the sale of real estate for taxes failing to be derived, in express terms or by necessary implication, from the organic act, or through section 40 of that act from the old charter of Washington City, as amended by the act of Congress of May 17, 1848, the attempt has been made to show that Congress approved the act of the Legislative Assembly of August 10, 1871, by amending it in the act for the support of the District Government, approved March 3d, 1875. Section 15 of which act provides that the 3d section of the act of the Legislative Assembly of the District of Columbia, entitled "an act prescribing the mode of assessment for special improvements," &c., "be *amended* so that the sales under said law shall be advertised *twice a week* for three successive weeks instead of *as heretofore required.*" This amendment gives no authority to sell—it simply changes the time of

advertising sales, and the attempt to derive through it a Congressional ratification by implication, cannot prevail. It is, in fact, but one of numerous pieces of legislative patchwork intended to cure the defects of the organic act, which has characterized the administration of affairs in this District since the enactment thereof.

Had the original act been first ratified by Congress, then the amendment would have applied to a law of the District, but the amendment being made to what was not a law, simply falls with the unauthorized act to which it is applied. The ratification of the act itself with its extraordinary powers of creating liens upon real estate, selling the same for taxes, and making a deed therefor by the Governor "a good and perfect title," needed to have a specific and positive ratification in terms, by Congress, before it could become a law. No such powers can be inferred, from a subsequent act fixing a time for advertisements.

We are told that our proper remedy was a *certiorari*, and the appellants say that

"2. The Court erred in holding that the remedy for irregularities or errors was not by *certiorari*, but by injunction."

That the proper remedy was by injunction we think is already shown; but in answer to this objection we shall endeavor to show that *certiorari* is not an available remedy in this case:

What was the official act against which we asked the protection of the Court by Injunction?

It was the sale of a lot of ground at public auction—*a purely ministerial or executive act.*

Certiorari, is defined by Bouvier to be "the name of a writ issued from a superior Court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in a particular case." He further says: "By the common law a Supreme Court has power to review the proceedings of all inferior tribunals, and to pass upon their jurisdiction and decisions *on questions of law.* But in general the determination of such inferior courts *on question of fact* are conclusive, and cannot be reversed on certiorari, unless some statute confers the power on such supreme court." (6 Wend., 564; 10 Pick., 358; 4 Halst., 209.

Was a writ of *certiorari* available at any period of the proceedings in review in this case? Of one thing we are certain, and that is, it could, at no time, have been an adequate remedy for this appellee; and at the date of issuing the injunction, could not possibly have accomplished his purpose.

"The levy of taxes is *not a judicial function.* Its exercise by the constitution of all the States and by the theory of our English origin is *exclusively legislative.*" Heine vs. Levee Commissioners, 19 Wallace, 160.

§ 741. (Dillon on Mu. Cor.) "At common law, *certiorari* only lies to inferior courts and officers exercising *judicial* powers; not only so, but the act to be reviewed must be *judicial* in its nature, and not merely ministerial. . . If the local authorities have decided that the public convenience or welfare requires the exercise of the power, as for example the establishment or improvement of a street, the decision of such a question cannot be judicially revised on *certiorari*."

See also U. S. Digest, First Series, Vol. III, *Certiorari*, p. 258.

"208. Proceedings of the City Council of Cincinnati in opening streets, and in assessing damages and *special taxes* cannot be reviewed on *certiorari*. Dixon vs. Cincinnati, 14 Ohio, 240.

"213. *A certiorari* will *not* lie to a collector of taxes to examine his right to proceed upon process under which he is acting. People vs. Supervisors of Queens, 1 Hill, N. Y., 195.

"218, (p. 259.) *A certiorari* to the supervisors of a county to remove the assessments for county charges will not be sustained. People vs. Supervisors, &c., 15 Wendall (N. Y.) 198.

"219. *A certiorari* will lie to review *judicial* acts of municipal corporations; *aliter* as to acts simply *ministerial*. People vs. Mayor of N. Y., 5 Barb. (N. Y.) 43.

"272, (page 261.) The office of the writ of *certiorari* is to correct errors of a *judicial*, not of a ministerial or legislative character. It is not proper to issue the writ to review the legislation of any body having authority to legislate, even when they may have exceeded their powers. *People vs. Board of Health*, 33 Barb., N. Y., 344; 12 Abb. Pr, 88; 20 How. Pr., 458. An order of a board of health adjudging a certain business to be a nuisance, is a *legislative act* within this rule.

The third error cited by appellants is as follows, viz:

"3. The Court erred in holding that the cost of the improvement had been reimbursed to the District by Congress."

The appropriation by Congress of a sum to New York avenue greater than the whole amount of the assessment is admitted by the Commissioners in their answer, of which Justice MacArthur very properly says—"The payment of a tax to the proper officers extinguishes the indebtedness and relieves the property upon which it is assessed; and it is the duty of the government to make the proper appropriation so as to redeem any evidence they have given of the indebtedness."

It is a good rule of law that there can be but one payment of one debt.

U. S. Dig., page 36, Vol. X—

12. If actions be commenced against several different persons for the same debt, payment by one defendant will bar further

proceedings against the others. Boggs vs. Lancaster Bank, 7 Watts & S. (Pa.) 381.

13. A plaintiff is entitled to but one satisfaction of several judgments obtained against several persons for the same debt. Davis vs. Berkley, 1 Bailey (S. C.) 141.

16. Where Congress awards to a claimant all that he alleges to be his legal demand, there being no mistake in the fact, and the claim being doubtful, the payment is an accord and satisfaction, and will be deemed final and conclusive. Johnson vs. U. S., 2 Ct. of Claims, 167.

28. The gratuitous remission of a debt is as valid as if for a valuable consideration, and may be express or implied. Mouton vs. Noble, 1 La. Ann. 194.

Now, Congress having appropriated on account of New York avenue a sum exceeding the whole expenditure thereupon, and said sum of money having been paid to the District authorities, it was their duty to apply the same to the liquidation of the debt incurred. If they did not do so, it becomes an interesting question for the present authorities to know the reason why and to ascertain what was done with the money.

To the fourth objection of the appellants, viz:

"4. That the Court erred in holding that there was no mode of assessment provided by the Act of the Legislative Assembly of August 10, 1871"—

We reply:

That unless a barren repetition in the Act of Assembly of the clause in the organic act requiring the Board of Public Works to "assess in such manner as shall be prescribed by law" provided a mode of assessment, then the Court was right and the error is with the exceptant. But we propose to answer this and the remaining alleged errors together, inasmuch as they unitedly involve the question of the validity of the Certificate of Indebtedness and its pretended lien upon the real estate of appellee, and the authority of the Legislative Assembly and the Board of Public Works respectively under the charter.

Points and Authorities.

1. As to the alleged lien created by said certificate and assessment, and as a preliminary but not unimportant proposition,—*the burden is upon the corporation to show its authority to create a lien upon real estate or to sell the same for taxes, by express grant.*

"It is undoubtedly a sound proposition that taxes whether general or special are *not liens* upon the property against which they are assessed unless *made so by the charter*, or unless the corporation is authorized by the Legislature to declare them to be liens." [See Dillon on Municipal Corporations, Vol. I, § 659

and notes. Approvingly quoted by Supreme Ct. U. S., in Heine vs. Levee Commissioners, 19 Wallace, 659.

"Taxes are not commonly a lien upon lands unless made so by express legislative authority." Cooley on Taxation, page 305.

"Municipal corporations of course have no authority to create liens, by ordinance or otherwise, when none has been expressly conferred upon them." Idem, page 307, and notes.

The charter of the government for the District of Columbia constituting it "a body corporate for municipal purposes" nowhere makes taxes a lien upon property, nor has Congress, which by the Constitution of the United States has "exclusive legislation over said District," authorized said corporation or the Board of Public Works to declare them to be liens.

The lien is assumed to have been created by the act of the Legislative Assembly of the District, approved August 10, 1871; but, being unauthorized by the charter or organic act, so much of said municipal act as assumes to create a lien upon property assessed for local improvements, is void.

Nor does said charter give the power to sell, or any other summary process for the collection of taxes. Where no such power is expressly given, the Corporation must sue for them.

"If the charter gives power to impose taxes, but is silent respecting the method of their recovery, corporations *may sue* for them. But the power to levy and collect a tax whether general or special, does *not* carry with it the authority to collect by distress or *sale of property*, or in any way more summary than by a resort to legal proceedings. . . Therefore *the power to sell for the non-payment of taxes*, general or special, *cannot be inferred* from an express provision in the charter to the effect that the collection of taxes provided for therein shall be enforced in such manner as may be provided for by ordinances of the city."

Dillon on Mun. Cor., § 656.

Hilliard's Law of Taxation, page 382, also says:

"§ 62. A statute provides for the making of the estimates for street improvements, and that such estimates shall be a lien. Held that the cost of street improvements is not a lien until the required estimate has been made, and *but for the statute there would be no lien.*"

Jones vs. Schulmyer, 39 Ind., 119.

"It is important to bear in mind that the authority to municipalities, to impose burdens of any character upon persons or property is *wholly statutory*, and as its result may divest property, it must be strictly pursued. This rule includes special assessments for local improvements," see Dillon on Corporations, Vol. 2, p.

706, § 605, and further in his notes: "The burden is upon the corporation to show the grant by express words or necessary implication. For otherwise it cannot be justified in the exercise of this high prerogative of sovereignty."

"In a recent case the general rule has been affirmed that a sale of land for taxes is illegal unless expressly authorized by statute." McPike vs. Pen, 51 Mis., 63; Hilliard's Law of Taxation, p. 484.

What statute of Congress expressly authorizes the creation of a lien upon real estate for special improvement taxes by the corporation of this District as last organized, or its sale by summary process, on account thereof?

The charter or organic act, so called, neither makes these taxes a lien, nor gives power or authority to the municipal legislature to make them so,—nor does it authorize their collection by any summary process whatsoever.

All the authority for issuing the Certificate of Indebtedness under which the sale sought to be prevented in this case is made, is derived from the act of the District Legislature, approved August 10, 1871. But as the District government had no authority conferred upon it by the charter to make taxes a lien upon real estate, to sell real estate by summary process therefor, or to issue Certificates of Indebtedness and raise money thereupon, it follows that said act was and is null and void as to all these powers.

The Constitution of the United States gives Congress "exclusive legislation" over this District, and "exclusive legislation" explains itself. Congress is, itself, but a body of delegates, and it cannot delegate powers conferred upon it *exclusively* by the Constitution, nor abandon the duties imposed upon it to others.

"The grant to Congress of exclusive jurisdiction in all cases whatsoever within the District of Columbia includes the power of taxation." Langbarrow vs. Blake, 5 Wheaton, 317.

Its legislative powers doubtless include the authority to create a corporation to perform all necessary public functions except such as would conflict with its own constitutional duty of "exclusive legislation."

It is not necessary to discuss the question as to whether the Government of the District of Columbia was a corporation or not, inasmuch as it was declared in the first section of the organic act to be "hereby constituted a body corporate for municipal purposes."

And there can be no question about the still more limited authority and dependence upon law of the Board of Public Works, that branch of the District Government created by, and whose powers are, set forth in section 37 of the Organic Act. See Barnes vs. District of Columbia, in which the Supreme Ct. of the U. S. held as follows:

"In the case before us we think that Congress intended to

make the Board of Public Works a portion of the municipal corporation. The governor, or mayor, as he would ordinarily be called, represented the executive department; the legislative assembly, like a common council, had the exclusive authority to pass all laws or ordinances upon the large class of subjects committed to its charge, with certain specified restrictions; and to the Board of Public Works, like an ordinary agent of the corporation, was given the exclusive control of the streets and alleys. Names are not things. Perhaps there is no restriction on the power of Congress to create a state within the limits of the District of Columbia, but it does not make an organization a state to call its mayor a governor, or its common council a legislative assembly, or its superintendent of streets a board of public works, especially when the statute by which they are created opens with a declaration of its intention to create a municipal corporation. We take the body thus organized to be a municipal corporation, and that its parts are composed of the members referred to, and we hold, therefore, that the proceedings by that body, in the repair and improvement of the street, out of which the accident in question arose, are the proceedings of the municipal corporation."

Their powers were well defined. They gave said Board entire control of the streets, avenues, alleys and sewers of the city, authorized them "to disburse upon their warrant all moneys appropriated by the United States, or the District of Columbia, or collected from property-holders, in *pursuance of law*, for the improvement of streets, avenues, alleys and sewers, and roads and bridges, and shall assess in such manner as shall be *prescribed by law*, upon the property adjoining and to be especially *benefited* by the improvements authorized by law and to be made by them, a reasonable proportion of the cost of the improvement, not exceeding one-third of such cost, which sum shall be collected *as all other taxes are collected*."

"They shall make all necessary regulations respecting the construction of private buildings," subject to legislative supervision; and are prohibited from making contracts to "bind the District for any sums except in pursuance of appropriations made by law, and not until such appropriations have been made."

There is nothing herein contained authorizing said Board of Public Works to collect assessments, to make them a lien upon real estate, or to sell property. While their powers are subjected to regulation by law, there is no authority given to the municipal legislature to enlarge them. They are therefore limited by the terms of the grant, unless we can find some subsequent act of Congress granting further power, and I know of none touching the point at issue.

"A municipal corporation can exercise no power which is not in express terms or by fair implication conferred upon it," says

the Supreme Ct. of the U. S. in Thompson vs. Lee Co., 3 Wall., 320; Thomas vs. Richmond, U. S. Sup. Ct., Dec. Term, 1871, 12 Wall., 349; S. P. Clark vs. Davenport, 14 Iowa, 495.

See also per Nelson J., in Minturn vs. Larne, 23 Howard, U. S., 435, 436, 1859, construing municipal charters to ferry rights:

"It is a well settled rule of construction of grants by legislatures to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any *ambiguity* or *doubt* arising out of the terms used *must be resolved in favor of the public.*"

Now the act of the Legislature under which the Certificate of Indebtedness involved in this case was issued, approved August 10, 1871, in its first section enacts that "whenever any of the improvements referred to in Section 37 of the Organic Act shall be completed, a statement of the cost thereof shall be prepared by the Board of Public Works and filed in the office thereof, and immediately thereafter an assessment, based upon said statement shall be made, as provided for in said section of said act, which assessment shall be collected by the said Board in the same manner as other taxes of the District of Columbia are now or may hereafter be authorized to be collected."

Thus we see no mode of assessment is prescribed by law, but the Board of Public Works becomes a law unto itself and assesses the property of the citizens at its own will. The charter says the manner shall be prescribed by law, and the law says the assessment shall be made as provided by the charter. If the charter fulfilled its own mission in this respect, and no mode of assessment was necessary to be thereafter prescribed by law, why did it so enact? It is no fulfilment of its requirement to throw the Board of Public Works back upon the charter provisions, and then leave them to select their own mode of assessment. What the charter intended was that the Legislature should "*prescribe by law*" the mode of assessment—that as there are many modes of assessment known among men whereby corporations secure the revenues for improvements, some one of these modes, or something else adapted to the requirements of the situation here should be prescribed in detail for the government of the Board of Public Works in its action, and the protection of the property-holders. The law should have said whether said Board was to be governed by measurement or benefits, whether a man whose lot was fifty feet broad and fifty feet deep should pay the same, or more, than his next door neighbor whose lot was twenty-five feet broad and a hundred feet deep—whether frontage on the street was to regulate the assessment or the value of the lot improved—whether

10,000 square feet with only 15 feet frontage was to pay less than 5,000 square feet with 20 feet frontage?

As it was, the Legislature delegated its power to the Board of Public Works, and let it select the mode, and it made no law on the subject, and could make none.

The Legislature of the District could not delegate its legislative powers to any other body or even to a committee of its own members, nor could it bargain or barter them away.

"Powers devolved by charter cannot be delegated." Thus, where by the charter or statute, local improvements, to be assessed upon the adjacent property owners are to be constructed in "*such manner as the common council shall prescribe*" by ordinance, it is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode or plan of improvement. Such ordinance *is void*, since powers of this kind must be exercised in strict conformity with the charter or incorporating act. (See Thompson vs. Schermerhorn, 6 N. Y., 2 Seld. 92, 1857, relating to grading streets, affirming S. C., 9 Bart., 152, and approving same, Dillon on Mun. Cor., § 60.)

"A municipal corporation cannot delegate powers conferred upon and to be exercised by it to a street committee or others." White vs. Mayor, 2 Swan. Tenn., 364, 1852; Smith vs. Morse, 2 Cal., 524.

As legislative powers of corporations cannot be delegated, neither can they be bargained or bartered away.

While the organic act explicitly states that the proportion of the cost of improvement not exceeding one-third to be assessed to property adjoining "*shall be collected as all other taxes are collected,*" it will be seen that the legislative act says, "shall be collected [by the said board in the same manner as] other taxes [of the District of Columbia are now or may hereafter be authorized to be collected,"] which makes a material difference, and prescribes a method of collection at variance with the organic act. Such act of Assembly is therefore void.

These assessments being required to be collected as "all other taxes" are collected, must necessarily be governed by the act prescribing the duties of the collector of taxes, and be collected by him as the proper accounting officer of the District Government.

The organic act does not authorize the Board of Public Works to collect any money. They are required to "*disburse upon their warrant*" certain appropriated and collected funds. Why "*upon their warrant?*" In order that they might be held to a proper sense of responsibility by the Treasurer of the District, an officer provided for in the organic act. The Board of Public Works was not intended or authorized by Congress, the only constitu-

tional legislature of this District, in its charter of the late government, to receive or collect any money. A power to receive and collect was in the act as it originally passed the House of Representatives, but was stricken out in the Senate; thus making their exclusion from that branch of the municipal business more marked.

I refer, in support of these views, to the opinion of his Honor Judge Wylie, delivered on the 9th November, 1872, in which he said:

"In his opinion the assessment is wholly without authority of law. The improvements in front of churches and school houses should be charged to the general fund, and not to the private citizen. There has been no mode prescribed by law, and the Board of Public Works have adopted a mode *which Congress in so many words has said they shall not do.*

"The act of August, 1871, says these taxes shall be collected as other taxes, but the 2d section prescribes a different manner of collecting the same."

Says Dillon on Municipal Corporations:

§ 620. So under a charter constituting the City Marshal the collector of taxes, and making it his duty to receive and collect the taxes due the corporation, it is not competent for the council by ordinance to dispense with the duties which the charter imposes upon this officer and devolve them upon another. (Thompson vs. Carroll, 22 Howard, U. S., 422, 1859.)

It is plain that the *powers of taxation* conferred upon the municipal authorities by the charter or organic act, and the mode of exercising such powers when prescribed therein, *cannot be varied by ordinances* or by-laws. (Weeks vs. Milwaukee, 10 Wis., which holds that the city cannot exempt from taxation property that the laws make taxable.)

Again: the charter required the assessments for special improvements to be made upon the property adjoining *benefited* by improvement; but these assessments have been made upon the *frontage* of the lots, not according to their relative increase of value, omitting two large lot fronts of 134 feet.

"If the charter require the assessment to be according to *benefits* received, it is not sufficient to assess according to *frontage*, and the report of the commissioners of assessment should show that the assessment was made on the right basis." (State vs. Hudson, 5 Dutch. N. J., 104, 1860—idem 115; State vs. Bergen, same, 266.) Where the charge is to be "*in proportion to frontage*," the amount of the whole work is to be ascertained, and each lot charged in the proportion its frontage bears to that of all the lots. (Neenan vs. Smith, 50 Mo., 525; St. Louis vs. Clemens, 49 Mo., 552.)

§ 80. With regard to apportionment, each lot is to be charged with its *special* benefits and the remainder paid by *equal and uniform taxation.* (St. John vs. East, 50 Ill., 92; Hilliard's Law of Taxation, p. 387.)

§ 81. Where the act provides that an improvement shall be apportioned and charged to the adjoining property according to the frontage of each owner, and that the amount so apportioned shall constitute a special tax on the property and be paid by the owner; the amount should be apportioned and charged to each lot separately, according to its respective frontage. (St. Louis vs. Clemens, 49 Mo., 552 idem.)

As to the charge of $6,599.10 shown by the published reports to have been for repairing, we claim that the same was illegally assessed against us, and that the law governing such cases is properly stated in Hammett vs. Philada., 65 Penna. St., 146; thus "Local assessments may be made for paving a street; but when a street is once opened and paved, and is thus part of the highways of the city, the *repaving of it cannot be assessed on the adjoining lots;* but it is part of the general duty of the corporation." See also Washington ave. case, 69 Pa. St., 352, 1871; Hammett against City of Philadelphia, (15th. P. F. Smith. Page 146.) This was an action on municipal claim for Nicholson pavement, laid in front of Hammett's property, on North Broad street. The latter's affidavit of defense was held insufficient by the old District Court, and judgment was given for the city. Hammett appealed to the Supreme Court, assigning for error that the Court below erred in not deciding that the ordinance and act of Assembly authorizing the payment were respectively null and void, by reason of their being in violation of the Constitution of the State, and of their being a delegation and exercise of a power to impose upon a few individuals a heavy expenditure which should be borne by the public at large. Upon the question thus presented the Supreme Court thus decided:

1. The Legislature may confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited.

2. This is a species of taxation.

3. It is a question not of right but of expediency, of which the Legislature are the judges.

4. The rule is, local taxation for local purposes, or taxation for the benefits conferred, and not beyond them.

5. The Legislature, by its general power, cannot levy or authorize a municipality to levy a local tax for general purposes.

* * * * *

9. If the case is within the principle of taxation, the proportion of contribution and other details are within the discretion of the taxing power.

10. The assessment, when made in pursuance of law, is final and conclusive.

11. The original paving of a street is a local improvement, and is within the principle of assessing the cost on the lot lying upon it.

12. When a street is opened and paved, thus assimilated with and made a part of the rest of the city, all the particular benefits of the locality derived from the improvement have been received and enjoyed.

13. Repairing streets is a part of the duty of the municipality for the general good.

14. Broad street is a street, a portion of which is paved according to authority of law. An act of Assembly required it to be paved its entire length, and an ordinance of Councils imposed the cost of improvement on the owners of abutting property.

Held—That the act is unconstitutional and void so far as it authorizes Councils to enact ordinances requiring the cost of improvement to be paid by owners of abutting property.

The added charge of 5 per cent. for general expenses amounting to $4,801.42, as shown by the printed reports, we also claim was unlawful.

§ 607. "So power to levy and collect a special tax" for lighting a city *does not authorize* the council to *add to the tax a percentage for collection fees*, nor the cost of proceedings before the mayor; these services must be paid for from the general revenue unless otherwise specifically provided for by the charter. (Dillon on Mun. Cor.)

As to the exemption of church and District property from assessment for their proportionate share of the special assessment admitted by the defendants to have been made, and averred to have been properly made, we hold that the law is properly stated by Judge Dillon in his work on Municipal Corporations, thus:

"§ 616. As the burden of taxation ought to fall equally upon all, statutes *exempting persons or property are construed with strictness*, and the exemption should be denied unless so clearly granted as to be free from fair doubt. Thus although an 'assessment' is of the nature of a tax, and is authorized by, *and is* a branch of, the taxing power, yet a general statute exempting certain property—as, for example, *churches* from '*taxation by any law of the State*,'—does not exempt it from liability for street assessment. So, in Maryland, the exemption of property of a cemetery company '*from any tax or public imposition whatever*,' does not exempt it from a paving tax for improving a street in front of the property, the Court holding that the intent of the Legislature was to exempt the property from all taxes or impositions for the purpose of *revenue*, but not to exonerate it from charges in-

separably incidental to its location with respect to other property. (See Mayor, &c., 11 Johns, 77.) This is the leading case on the subject, is elaborately discussed, and the point *decided* has been generally approved."

I would also refer to the following from Hilliard's new work on the Law of Taxation:

EXEMPTIONS. Hilliard, § 39, p. 370, 371; Opinion of Judge Devans of Mass., in Boston Seamen's Friend Society vs. Mayor and Aldermen of Boston. Under the act of 1865, providing for levelling and improving the Fort Hill district, Oliver street was laid out anew, widened and graded, and the property of the Society at the corner of Purchase and Oliver streets was assessed under the provisions of the statutes for a proportional share of the cost. The Society claimed exemption under the General Statutes, Ch. 11, § 5, Cl. 3, which exempts from taxation real estate owned by literary, benevolent, charitable and scientific institutions, and occupied by them for the purposes for which they were incorporated. The Court refused to sustain the points urged by the Society on the ground that the exemption granted by the General Statutes was to be construed as extending only to taxation for the public charges of Government, and not as including assessments laid for expenditures of a local character, the benefits of which were to be immediately experienced in the particular localities where the property so claimed to be exempt might be situated. * * The precedents in many other States, New York, Pennsylvania, Illinois, Missouri, Michigan, Louisiana, where similar questions had arisen, were all against allowing the exemption." The Court might also have cited Maryland as against it. In the second case, the Childrens' Mission to the Children of the Destitute, was upon the same principle held liable to taxation for benefits from the widening of Tremont street. And the same doctrine was reaffirmed to prevent the Worcester Agricultural Society from obtaining exemption from assessment for the building of a sewer.

Judge Cooley, in his work on Taxation, says:

"All exemptions are to be strictly construed. They embrace only what is in their terms. This general rule has many illustrations, one of the most striking of which is found in the case of exemption of church and school property. The general exemption of such property from taxation, it is held, will not exempt them from special assessment for local improvement, such as paving and repair of the streets on which they stand and the like. In the leading case, the words of the exemption were, that no church or place of public worship 'should be taxed by any law of this State.' Upon this the Court remarked: The word *taxes* means burdens, charges, or impositions, put or set upon

persons or property for public uses;' and this is the definition which Lord Coke gives of the word *talliage*, (2 Inst., 232;) and Lord Holt in Carth., 438, gives the same definition to the word tax. The Legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister not exceeding in value fifteen hundred dollars; but to pay for the opening of a street in the value of the benefit or advantage derived from it, is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister as well as of other persons pay for such an improvement in proportion as it is benefited?" (Cooley on Taxation, pages 146, 147, and notes.)

The language of the Act of Congress exempting Church property "from any and all taxes or assessment national and municipal," is certainly very strong—too strong, in fact, to be constitutional. If the exemption of churches from taxation leaves a deficit in the revenue which has to be made up by taxing the public, it is as much a levy for the support of a religious establishment as if directly made for that purpose; and the authorities might as well demand of the neighbors of the Presbyterian church on New York avenue that they should build the church itself as that they should lay its pavements. What difference is there in apportioning the $1,375, cost of the said pavement, at the specially assessed rate, by a specific charge therefor amongst neighboring property holders, or in omitting the item, but including the amount thereof, in the bill against them? They are compelled to pay the whole amount either way. But, whether the property referred to was properly exempted or not, there can be no question but that the amount of the exemption was chargable to the District instead of the private property-holders along the line of New York avenue.

In the cases of Taylor, Collector of Peoria county et al. vs. Secor and Tracey; in Mellor, Col. of Cook Co. vs. Jessup et al., and in Leib, &c. vs. Kidder and Stone, the Supreme Court of the U. S. says, referring to its own decision in Dow vs. Chicago, 11 Wall., 108:

"In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequence of interference with their proceedings in that matter, says: 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity

of suits or produce irreparable injury; or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So, in the case of Hannewinkle vs. Georgetown, the court says: 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction.' (15 Wall., 548.) We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or mistakes in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court when so acting. *The levy of taxes is not a judicial function. Its exercise, by the constitution of all the States and by the theory of our English origin, is exclusively legislative.* (Heine vs. The Levee Commissioners, 19 Wall., 660.)

"A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy complained of, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner.

"The reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns, and cities we need not here inquire, but there is both reason and authority for holding that the control of the courts in the exercise of power over private property by these corporations is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State.

(High on Injunctions, § 369, and cases there cited.) The assessments in the cases before us, of which complaint is made, are all made by the State board of equalization, and though the taxes are collected by the county authorities, a large part of them go to make up the revenue of the State."

The language of the Court here sets forth the grounds upon which equity will interfere by injunction for the protection of the citizen, and expressly says : "We do not propose to lay down in these cases any absolute limitation of the powers of a Court of Equity in restraining the collection of illegal taxes." The admitted grounds for equity jurisdiction are, that "it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or when the property is real estate throw a cloud upon the title of the complainant before the aid of a Court of Equity can be invoked."

The appellants in this case have made the proceedings in a previous case in which the appellee and others were complainants, invoking the interposition of equity by injunction to restrain the Board of Public Works from proceeding with the assessment of New York avenue, between 9th and 15th streets, a part of their answer. In the bill filed in that case, the danger of *multiplicity of suits* was alleged, and it still continues, and on that with other grounds alleged, the appellee and his co-complainants were then entitled to an injunction which the Court below refused to grant. It has since granted an injunction upon the appellee's separate complaint for other reasons, amongst which are "a cloud upon the title to his real estate." That cloud existed "*before* the aid of a Court of Equity could be invoked," by reason of the issuing of a certificate of indebtedness purporting to be a *lien* upon it, with authorization of sale, if the same were not paid, and declaration in the act under which it was issued that a deed of said property so sold, signed by the Governor, should pass a valid title to the same. Such a clause in a constitutional act of the Legislature of a State, or the charter of a municipal corporation, would authorize the interposition of equity, and this Court draws a distinction between the relative rights of States and municipal corporations in the decision last referred to when it says:

"Whether the same rigid rule" (namely, for equitable relief) "should be applied to taxes levied by counties, towns and cities we need not here inquire, but there is *both reason and authority for holding that the control of the Courts in the exercise of power over private property by these corporations is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State.*"

From the date of the issuing of said certificate in September 2, 1872, this cloud upon appellee's title has existed, and it has done

him "irreparable injury" in that it has rendered his property unavailable either to pledge as security for a loan, or to sell to others. Nobody will buy the lot in litigation until this Court definitely determines the questions involved in this case. Fraud in the assessment is alleged, (one of the grounds for injunction cited in Hannewinkle vs. Georgetown,) and proven in the admitted exemption of church property and imposition of its share of assessment upon the appellee and *others*, and in the extra charge for superintendence, as well as shown in the charge for repaving a second time a portion of the avenue at the request of parties, which, being repairs, was properly chargeable to the whole district.

The fact that the party "has no adequate remedy by the ordinary processes of law" is also ground for equity to interpose, says the Court. Where was or is this appellee's remedy by the *ordinary processes* of the law? or even by the extraordinary process of certiorari, as claimed by the appellants?

"*The levy of taxes*," says the Supreme Court, "*is not a judicial function.* Its exercise, by the constitution of all the States, and by the theory of our English origin, is *exclusively legislative.*" *Certiorari* will not lie for the review of a legislative act or an executive act—only for *a judicial act*, and we are expressly told by the highest authority that assessment *is not a judicial act.* Neither is the sale of property a judicial act. It is simply a ministerial act of the executive officer. Here there is no remedy. Is it any adequate remedy to hold possession of property with a cloud upon its title, which we cannot sell or mortgage, until a purchaser of a tax title chooses to come forward of his own volition, perhaps in a year, perhaps not in a life-time, perhaps never, to try the title by ejectment? Should such a purchaser succeed, the appellee would lose his property for a grossly inadequate price paid at a tax sale, without opportunity to try his equities before a competent tribunal. Instead of being merely made to pay his proportion of the assessment, he would be mulcted in a penalty equal to the value of his property above the sum assessed. He could not recover the difference, although the circumstances attending the sale were such as to prevent competition, and compel the holder of the certificate to bid alone, as in the present instance.

A rule insisted upon, and which we admit, is that he who asks equity must do equity. It has been urged, and a dissenting judge held, that the appellee should have paid into court what he did owe of this assessment, before asking to be relieved from the balance. That would be simply impossible—firstly, because he holds that, the whole assessment being illegal, he does not owe anything; and, secondly, because, with admitted exemptions and discrepancies, if it were legal, an audit of the whole would be

necessary to ascertain the amount due by him. He stands ready to pay any amount authoritatively declared to be legally due and demandable; but proposes and intends to do nothing further. The fact that the Court has no power to order a new assessment, is no reason why he should pay an illegal one. The court has no right to compel him to pay an unjust or unlawful account by whomsoever it may be rendered. A Corporation is no better than an individual in this respect, and the burden of proof rests upon it to show the righteousness of its claim, as well as authority for its mode of collecting the same. If it shall fall short in either, then it must lose. The Court of Appeals in Maryland did not refuse Porter his permanent injunction against the Mayor and City Council of Baltimore, and the numerous other citizens interested along the line of Charles street extended, because said Court could make no assessment. The Corporation had paved the avenue and the Corporation had to pay for it. The authorities of the Corporation did not choose to follow the Act of Assembly in doing the work, and the Court of Appeals taught them a lesson, not since forgotten, that they must assess for improvements according to law, or lose the cost of the improvements. Looseness of administration is as much an evil requiring correction, as the disposition of citizens to avoid payment of taxes. Usurpation of authority can only be curbed in municipal officials by the wholesome restraint of the Courts. The danger is not that citizens will escape taxation; but that, through the enormous growth of municipal extravagance and corruption, there will be few left with any property to tax.

The plea of interruption of the collection of necessary revenue does not apply in this case. No question of public policy prevents this Court from staying the further prosecution of the sale perpetually enjoined by the Court below by an affirmance of its judgment. It will not interrupt the collection of any revenue for the current expenses of the government. The District of Columbia has no interest in this suit. Whatever interest it may have had it parted with by the sale of the Certificate of Indebtedness to the First National Bank of the City of New York. This is substantially, therefore, a contest between private parties. The Commissioners of the District, even if lawfully authorized to perform the functions devolved by the Act of Assembly upon the Board of Public Works in this instance, are but trustees to sell for the benefit of the certificate holder. Nor can they do any act with reference to said Certificate which the Board of Public Works, if its official life had continued, might not have done.

The holder of the Certificate purchased it in the face of Appellee's effort, in conjunction with others, to prevent said Board of Public Works from issuing the same, by injunction, in a cause which the said Appellant makes part of its answer in this case,

and also with full knowledge, as said answer shows, of Appellee's declared intention to contest the validity thereof. Such as it is, the First National Bank of New York bought the said Certificate of Indebtedness with all its imperfections on its head. There was no authority given to the Board of Public Works to sell the Certificates in the Act of Assembly which authorized the issuing of them, and without such authority specifically given in terms, said Board had no right to sell them. The right to sell is but an inference from the section which provides for the sale of the property named in such certificate for the benefit of the holder. How any one is to become the holder is not provided for. Whether by assignment or purchase, by whom, to whom, or in what method, the law does not specify. The right to dispose of these Certificates, like many other rights, was assumed by the Board of Public Works without authority of law. It was one of the numerous ways resorted to for raising money outside of the limitations prescribed in the charter. [See Mayor v. Ray, 19 Wallace, 468.]

The First National Bank of New York in its answer avers that the things complained of in the bill are trivial, and unworthy of the attention of this Court. Nothing is trivial which affects the rights and immunities of the citizen. This Appellee cares far less for the amount in controversy in this case, than in ascertaining whether he lives under a government of law or force, of justice or caprice; whether, in fact, a citizen of the United States residing in the District of Columbia has any rights that officials are bound to respect.

JOS. J. STEWART,
Solicitor for Appellee.

Supreme Court of the United States.

WILLIAM DENNISON ET AL.,

COM'R OF DIST. OF COLUMBIA, AND

FIRST NATIONAL BANK OF THE CITY OF NEW YORK,

Appellants,

Vs.

COLUMBUS ALEXANDER, *Appellee.*

Addition to Brief of Appellee.

Since the preparation of the foregoing brief of the appellee, there has been Congressional legislation affecting the subject-matter of this suit and the points in controversy, and the Supreme Court of the United States has given its opinion as to the influence of said legislation upon the disputed assessments for special improvements, prepared under the act of the Legislative Assembly of August 10, 1871.

There has also been Congressional legislation with reference to the amount involved in suits in the District of Columbia, upon which an appeal can be taken to this Court, which takes this case out of the jurisdiction of this Court, and Appellee therefore asks that the appeal may be dismissed.

On the 25th July, 1879, Congress passed "An Act to create an additional Associate Justice of the Supreme Court of the District of Columbia and for the better administration of justice in said District," sections 4 and 5 of which are as follows:

SEC. 4. The final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of $2,500, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal in the same manner

and under the same regulations as are provided in cases of writs of error on judgments or appeals from decisions rendered in a circuit court.

SEC. 5. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

The effect of this law upon pending cases was set forth in the decision of this Court in B. & P. Railroad Co. vs. Grant, Otto VIII, p. 398, and U. S. Sup. Ct. Reports.

In this case the Court decided to dismiss the suit because the act of Congress above referred to had deprived it of its jurisdiction over cases in which the amount involved was less than $2,500.

Chief Justice Waite, in delivering the opinion of the Court, said:

"The question is, whether there is any law now in force which gives us authority to re-examine, revise or affirm the judgment in this case. Nearly 70 years ago Mr. C. J. Marshall said in Dunisseau *vs.* U. S., (6 Cranch, 30,) that this 'Court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus, a writ of error lies to the judgment of a circuit court where the matter in controversy exceeds the value of $2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the Court considers this affirmative description as manifesting the intent of the Legislature to except from its appellate jurisdiction all cases decided in the circuits, where the matter in controversy is of less value and implies negative words.' "

Chief Justice Waite says: "There has been no departure from this rule, and it has been universally held that an appellate jurisdiction can only be exercised in cases where authority for that purpose has been given by Congress;" and "it is equally well settled, that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." And further:

"We think it will not be claimed that an appeal may now be taken on a writ of error sued out upon a decree or judgment rendered before the act of 1879 took effect if the matter in dispute is not more than $2,500, but it seems to us there is just as much authority for bringing up new cases under the old law as for hearing old ones."

This seems to dispose of the case at bar, in which the amount in controversy is less than $350, being a Certificate of Indebted-

ness of the Board of Public Works for $170.36, with interest at ten per cent. from the 2d September, 1872.

If, however, this case having come up upon a petition and order of the Chief Justice thereupon, it shall be considered as not included in the terms of the decision above cited, it is submitted that the Act of Congress of June, 1878, does not affect the equities of the complainant in this case.

In the case of George Mattingly *et al. vs.* The District of Columbia *et al.*, Oct. Term, 1878, Mr. JUSTICE STRONG delivered the opinion of the Court, in which, after a recital of the facts, he says:

"We do not propose to inquire whether the charges of the bill are well founded. Such an inquiry can have no bearing upon the case as it now stands; for were it conceded that the Board of Public Works had no authority to do the work that was done at the time when it was done, and consequently no authority to make an assessment of a part of its cost upon the complainants' property, or to assess in the manner in which the assessment was made, the concession would not dispose of the case, or establish that the complainants have a right to the equitable relief for which they pray. *There has been Congressional legislation since* 1872, *the effect of which upon the assessments is controlling.* There were also acts of the Legislative Assembly of the District, which very forcibly imply a confirmation of the acts and assessments of the Board of which the bill complains. If Congress or the Legislative Assembly had power to commit to the Board the duty of making the improvements and the power to prescribe that the assessments should be made in the manner in which they were made, *they had power to ratify the acts which they might have authorized, and the ratification, if made, was equivalent to an original authority,* according to the maxim, &c."

Again: "Passing by the Act of March 3d, 1875, which gave directions for sales to collect the assessments for special improvements, in itself presenting no doubtful implication, the Act of Congress of June 19th, 1878, appears to us to have set the matter at rest. The Act peremptorily directed the Commissioners of the District 'to enforce the collection according to existing laws, of all assessments for special improvements, perpared under an Act of the Legislative Assembly of August 10, 1871, as charges upon the property benefitted by the improvements in respect to which the said assessments were made.' It also authorized the Commissioners to revise such assessments within thirty days from the passage of the Act and correct the same, so far as the charges were erroneous or excessive. The meaning of this Act

is not to be mistaken. It was practically a confirmation of what the Board of Public Works had done. It is not to be conceded that Congress ordered the collection of assessments which it regarded as illegal, and the permission given to the Commissioners to correct errors and excess in them by giving drawback certificates, to be receivable in payment of assessments, leaves no doubt that the authority of the Board to make them as they were made was intended to be recognized. It is not denied that the Act had in view these assessments now assailed by the complainants, and no such denial could honestly be made. *We are of opinion, therefore, that the assessments have been ratified by Congress.* If there were errors in the manner of making them, or in the amount of the charges, provision was made for correction of the errors. If the Church and School properties should not have been exempted, and consequently the amount charged upon the complainant's properties was erroneously increased, the Commissioners were empowered to correct the wrong."

The Court thereupon affirmed the decision of the Court below.

This opinion of the Supreme Court of the United States does not touch upon the point chiefly actuating the Supreme Court of the District of Columbia in ordering a perpetual injunction in behalf of the Complainant Alexander in this cause. That point, as stated in the opinion of the Court by Justice McArthur, page 7, of the aforegoing brief, was that "the entire cost of the improvement has been assessed to and collected from the United States government." Upon which allegation the opinion says, page 11, after quoting from Commissioners' answer: "Now here it is admitted that an appropriation considerably exceeding the whole expenditure for the improvements on New York Avenue has been paid to the District. This would undoubtedly enure to the benefit of persons owning the adjoining lots. The payment of a tax to the proper officers *extinguishes the indebtedness and relieves the property upon which it is assessed; and it is the duty of the Government to make the proper application, so as to redeem any evidence they have given of the indebtedness.* The First National Bank should, therefore, present their certificate to the District. So far as the lot is concerned, the lien no longer exists."

In support of which opinion see Argument in foregoing Brief, pages 26 and 27.

The Court below also held that "*the Certificate sought to be enforced against the property of this complainant* (see page 9) *is without*

authority of law," for the reason among others thereinbefore stated that it is at variance with the Act of Congress (37th section of the organic act), which required that the special assessments "*shall be collected as all other taxes are collected*," while the Legislative Assembly "*in disregard of all this have prescribed an entirely different manner of collecting them.*" And again, (page 9,) "It cannot, I think, be successfully maintained that an Act of Congress which prohibits these certificates, and declares that *only taxes* which have been *lawfully assessed* can be collected is a ratification of the Assembly legislation, so as to take away the right of the tax payer to defend his property from sale upon *a lien which had been previously void.*"

The order of the Court, in pursuance of this opinion, decreed that "the prayer of the Bill of Complaint be, and the same is hereby allowed; and that an injunction be issued in accordance therewith, and said injunction be made permanent."

The prayer of the bill was for restraining the defendants "from selling or advertising, or attempting to sell, your Orator's lot named in said Certificate of Indebtedness and said advertisement as aforesaid in Square 286, and from *all further proceedings whatsoever under said Certificate, or to enforce the payment thereof.*"

Does the Act of Congress of June 19, 1878, directing the Commissioners of the District "to enforce the collection, *according to existing laws*, of all assessments for special improvements prepared under an Act of the Legislative Assembly of Aug. 10, 1871, as charges upon the property benefitted," validate the certificate under which the sale in this case was intended to have been made, which certificate was *void ab initio?*

Does enforcing the collection of these assessments "*according to existing laws*" mean according to the unlawful method prescribed by the Act of the Legislative Assembly under which the certificate in this case was issued and which the Court declared to be *void*, or in accordance with Acts of Congress prescribing a different mode of enforcing said collections and by different officers? If the latter, then the order of the Court below prohibiting all further proceedings whatever under said certificate must be sustained.

The ratification of the assessments does not necessarily carry with it the validation of the certificates of indebtedness issued

thereupon. On the contrary, the fact that the Act of Congress ratifying such assessments provides for their revision and abatement, and authorizes their collection "*according to existing laws*," invalidates a certificate issued without authority of law, and directs a different mode of collecting the amount of the assessment.

This appellee does not deny that the assessment at issue in this case is one of those which this Court in its decision just quoted held to have been ratified by Congress, and the Annual Report of the Commissioners of the District of Columbia for the year ending June 30, 1878, transmitted by the President to Congress, shows that said Commissioners have exercised their authority to correct said assessments by striking out $13,151.20 of the amount charged to that portion of New York Avenue, including this appellee's lot, a proportionate share of which deduction is allowed, of course, upon the assessment on said lot. [See Report of Comm'rs D. of C. 1878, p. 245.]

This, of itself, is a justification of this complainant's suit to prevent the sale of his property under a certificate of indebtedness based upon an excessive assessment, which has been officially corrected under an Act of Congress some six years after it was originally levied. But this correction of the assessment does not correct the certificate of indebtedness under which all further proceedings have been enjoined. There is considerable discrepency between them; and the question arises whether this new assessment of 1878 relates back to the date of the original assessment of 1872, and whether this complainant, who has been seeking redress in the Courts for many years against an unjust and unlawful assessment, which is at last determined, not by the merits of his case as originally instituted, but by intermediate legislation affecting the matter in issue, must pay interest on a confessedly erroneous assessment, and costs upon a righteous suit.

Assuming that Congress may validate a void assessment, does the Act of June 19, 1878, have the effect to make the assessment valid by relation as of the date of the invalid assessment? Or does it become valid only at the date when said Act took effect? The Act does not furnish a new rule of evidence, nor does it merely cure irregularities or formal defects in the proceedings or the assessment, it *creates a lien upon the property which before the*

passage of the Act was not chargeable with the lien. The Certificate in this case was issued in 1872, and the Act of Congress was not passed until 1878, some six years afterwards. This complainant, in vindication of his rights, entered into legal proceedings, which sustained them, and the *defendants were decreed to pay him his costs of suit.* This took place prior to the enactment of the Act of June 19, 1878. Does that Act invalidate the complainant's right under that decree to his costs of suit, predicated upon a righteous action and righteous decision of the Court as the case then stood?

In Reis vs. Graff, 51 California, page 86, it is held that:—

"An action cannot be maintained to enforce a lien for a street improvement, which lien did not exist at the time the action was commenced."

And the Court, by Justice Rhodes, says:

"The assessment, in our opinion, if it became a lien by virtue of the Act in question, became such at the date of the passage of the Act, and *did not take effect by relation as of a prior date.* There being at the commencement of the action no lien in fact upon the property, and the lien created by the Act not taking effect as of a prior date, the action cannot be maintained."

"When a plaintiff commences a suit without a cause of action, the defendant has a vested right to set up in that suit the absence of a cause of action as a defence; and of that right no legislation can deprive him." (Wright vs. Cradlebaugh, 3 Nev. 349; Mount vs. Wennick, 3 N. H., 481; Davis vs Minor, 1 How. Miss., 189, 191; Houston vs. Boyle, 10 Iredell, 496; Martindale vs. Moore, 3 Blackf., 282; Derringer vs. McConnell, 41 Ill., 228, 233; White vs. Hart, 13 Wall., 646; Dewarp vs Purdy, 29 Penn., 113; Garrett vs. Beaumont, 24 Miss., 397; Thomas Co. vs. Lathrop, 7 Conn., 557.)

[See Cooley on Constitutional Limitations, 381.]

In People vs. Holliday et al., Cal. Rep. 25, page 309, Justice Caury says:—

"Where the act to be done is essential to or constituent of the thing to be accomplished, its omission cannot be cured by legislative enactment having a *retrospective* and *retroactive* operation, so far as to impair rights already existing, or to create a new obligation, or impose a new duty, or attach a new disability in respect to transactions or considerations already past. [The Society, etc. vs. Wheeler, 2 Gallison, 139.]" And further, "Statutes which are retrospective in their character and to which is given

a retroactive effect have generally been considered in violation of common right and common reason, and *ipso facto* void, independently of any constitutional restrictions against their passage. (Bowman vs. Middleton, 1 Bays Rep., 252; Bonaparte vs. Camden & A. R. R. Co., 1 Bald. C. C. R., 223.)

"The law is the rule of civil conduct, and from its very nature must be prospective. In SMITH'S COMMENTARIES, Sect. 153, it is said: 'Retrospective laws are not only inconsistent with the idea of law as a rule of civil conduct, but they are in many instances only the exercise of *powers* which are in their nature strictly *judicial*, instead of legislative. Such laws, when only such, look *not to the future*, but upon the *past;* or, in other words, pronounce judgment upon acts done antecedent to their adoption; and in this respect they assume a *judicial power*, as contradistinguished from a legislative power. They assume to give character to facts which they did not possess at the time they took place, and then to judge of them in the new character thus legislatively created for them; to settle, in some instances, old rights depending on laws as they existed before the act was passed, by new principles created and applied by the retrospective act having no existence antecedent to the time of its passage, which then and not till then sprang into being.' "

We therefore pray the Court to affirm the decree of the Court below.

Respectfully submitted.

JOS. J. STEWART,
Of Counsel for Appellee.